SUPREME COURT, U. S.

JUL 28 1969

JOHN F. DAVIS, CLERK

No. 400

In the Supreme Court of the United States

WALTER G. FOWLER
MARGARET FOWLER CLARK
BRAXTON FOWLER,
PETITIONERS

v.

HOUSING AND URBAN RENEWAL AUTHORITY OF THE CITY OF CHARLOTTESVILLE, VIRGINIA

AND

THE CITY OF CHARLOTTESVILLE, VIRGINIA,
RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE CORPORATION COURT OF THE CITY OF CHARLOTTESVILLE.

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RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE CORPORATION COURT OF THE CITY OF CHARLOTTESVILLE.

The Counsel for the Petitioners on behalf of Walter G. Fowler, Margaret Fowler Clark and Braxton Fowler, petitions for a Writ of Certiorari to review the judgment in this case of the Corporation Court of the City of Charlottesville, Virginia.

OPINIONS BELOW

The Corporation Court did not write an opinion. The Supreme Court of Appeals of Virginia denied a petition for a Writ of Error without opinion.

JURISDICTION

The Judgment of the Supreme Court of Appeals denying the writ of Error was entered on April 29, 1969. The Jurisdiction of this Court is invoked under 28 U.S.C. 1257.

STATEMENT OF FACTS

The property which is the subject of the present suit is a tract of approximately .7 acres on the South side of Main Street in the City of Charlottesville, Virginia. The property is across Main Street from a tract of approximately 20 acres which was the original Vinegar Hill Urban Renewal Project area.

That project was begun in December, 1958. Acquisition of property was begun in July, 1962 and completed in January, 1965.

In the latter part of 1964 the Charlottesville Redevelopment and Housing Authority began consideration of acquisition of the tract of .7 acres with which this suit is concerned, and on December 1, 1964 the authority authorized the consultant firm it had employed to proceed with the amendment of the plan to include the area of .7 acre.

The study and report of the consulting firm as to the condition of the area were made in February, 1965. On September 8, 1966, the Authority passed its resolution finding the area to be blighted within the meaning of the Virginia Statute and authorizing its taking for urban renewal purposes.

In June, 1967, the City Council of Charlottesville approved the plan submitted by the authority for the proposed project area, which included the tract of .7 acre with which the present suit is concerned.

There is a conflict in the evidence as to the physical condition of much of the tract of .7 acre and its effect if any on the health safety moral, or welfare of the community.

However it is uncontroverted that the building on parcel 1 was admitted by defendants witness to be sound (R. 264), and that over half the area is unoccupied by buildings (R. 86).

It is also not disputed that between February, 1965 and September, 1966, a number of changes took place in the project area. One building characterized by defendants witness as dilapidated has been removed and the lot paved. (R. 337) Other changes are described in the Record at pages 333 and 335.

The original 20 acre tract was razed prior to April, 1965 and there were no buildings on it from that time.

The Petitioners filed suit in the Corporation Court of the City of Charlottesville asking that the action of the Authority in taking the land be enjoined on the grounds that such action was arbitrary and unreasonable. After hearing the evidence in the case the Court found for the Respondents and from that decision the Petitioners asked for a Writ of Error from the Supreme Court of Appeals of Virginia. The Petition for the Writ of Error was refused.

MANNER OF RAISING QUESTION

The question of the validity of the Authority's determination was generally raised in Paragraph 7, Amended Bill of Complaint, and more specifically raised by objections to use of the consultants report as the basis for the Authority's decision on the grounds that the Authority acted upon the report improperly and that the report was too remote in time to be the only basis for proper action by the Authority (see Transcript pages 261, 263, 265-66 and 520).

RIGHT CLAIMED

It is the contention of the Petitioners that the taking by the Authority constitutes a taking without due

process of law and in violation of Petitioners' rights under the Fourteenth Amendment to the United States Constitution.

QUESTIONS PRESENTED:

(1) Was the decision of the Redevelopment Authority as to the condition of the 7/10 of an acre so arbitrary and unreasonable as to constitute violation of due process?

(2) Were the actions of the Redevelopment Authority and the method by which it reached a determination arbitrary and unreasonable and therefore a violation of due process?

QUESTION 1

This Court in *Morgan* v. *U. S.*, 298 U.S. 468 has pointed out that administrative proceedings which require the taking and weighing of evidence, a determination of facts based on the evidence and the making of an order supported by the finding resembles a judicial proceeding and carries with it a duty that fundamental judicial requirements will be met. One of those requirements is that there must be evidence to support the pertinent and necessary findings of fact.

It is the contention of your Petitioner that the evidence which was presented to the Redevelopment Authority was insufficient to support the finding which the Authority made and that the finding is therefore arbitrary and unreasonable and constitutes a taking of property without due process.

If we turn to a review of the evidence and the requirements set by the Supreme Court of Appeals of the Commonwealth of Virginia we find first that the criteria for determining the presence of absence of blight in a particular area are set out in Virginia Code (1950) Section 36-49. A blighted area is one.

> "With buildings or improvements which by reason of dilapidation, obsolescense, over crowding, faulty arrangement of design, lack of ventilation, light and sanitary facilities, excessive land coverage, deleterious land use or obsolete layout, or any combination of these and other factors are detrimental to the safety, health, morals, or Welfare of the Community."

The existence of these conditions is the basis for the authority's power to acquire the property by eminent domain. *Housing Authority* v. *Denton*, 198 Va. 171, 178 (1956) (Hereinafter cited as *Denton*). Under the terms of the statute the Authority is to make the determination of blight, Denton at 177, and that determination is presumed to be valid unless it can be shown that the determination is arbitrary and unwarranted. *Runnels* v. *Housing* Authority, 207 Va. 407, 413 (1966). (Cited hereinafter as *Runnels*).

The two cases cited above are the only cases in Virginia which have dealt with the question of the correctness of a redevelopment authority's determination of blight in a particular area. In those cases the Court set out certain questions which it felt should be answered satisfactorily by the evidence before the Authority before a finding of blight is warranted.

The first of these is that the condition of the area will be considered as a whole and that is the controlling factor in the determination not the condition of isolated structures within the area. It was established at trial that the entire area in question is composed of some 32,800 square feet broken down into eight parcels. Of that 15,420 square feet of the property is paved, with an additional 1,708 square feet which is unoccupied by improvements. Transcript 62. Another parcel of 4,700 feet is covered by a building which both plaintiff's and defendant's witnesses agreed was not blighted. Transcript 65-66 and 333-334. The evidence of

the defendant's witnesses is particularly crucial since these witnesses are members of the same consulting firm which reported to the Redevelopment Authority and the evidence that they gave at trial was the evidence which they gave to the Authority.

Runnels adds several other questions to the one set out in Denton. The Court in that case pointed out the importance of

> "the evidence relating also to the question of whether the dilapidated or 'run-down' condition of the area was 'detrimental to the safety, health, morals, or welfare of the community' within the meaning of Code Section 36-49." *Runnels*, 412.

The evidence given by Respondent's witness, Carl Muse, is particularly interesting. As the building inspector for the City, this witness had the responsibility for seeing to it that the building code was complied with. He testified that he had given no citations in the area since 1965. Transcript 435. There would therefore be some question as to the seriousness of any claim that the area was detrimental to the safety of the community and in deed the Respondents did not pursue the point very far.

The Respondent's attempted to show two kinds of detriment to the welfare of the community. One was a sort of general detriment by the fact that the property occupies the western approach to Charlottesville, Transcript 607, and that the businesses in the area were termed "marginal" and "short term", Transcript 546. Aside from the fact that two of the businesses had been in the area for over 20 years, Transcript 140 and 160, and another had moved in approximately 4 years earlier and had recently bought the property on which it stood, Transcript 219, there was a good deal of testimony that the presence of urban renewal across the street and the fact that there had been several statements that the area was to be taken, made the proper-

ties in the area very difficult to rent. Transcript 198, 217. Obviously any area as unsettled as this had been for several years before the date of the inspection by the Authority is going to be difficult to rent to any but very small, marginal businesses.

The evidence of economic detriment was limited to a showing of the gain or loss of appraised value for real estate taxes in this area. The record shows that appraised value has in fact decreased in the area.

However, the record also shows that the entire downtown area had decreased in value over the same period of time. Transcript 479. The records also shows a significant difference between the value of the area and the value of a neighboring block. Transcript 481. It should be noted that this block is covered entirely by two large stores which are part of national chains. This could hardly be considered a fair comparison. Petitioners contend that if this area were compared to another like it, that is an area bordering or close to the original area of urban renewal demolition and made up of small or medium size buildings large enough for specialty type stores, the two areas would show similar decreases in value. The overall decrease in values in the entire downtown area is a clear indication that the primary reason for the decrease in the area here under consideration is the same as it is for the rest of the downtown: competition from new and more convenient shopping centers. The decrease of value in this area and in the downtown is not evidence of economic detriment but a realignment of values in light of the downtown's loss of its status as the only large shopping and business district in the area. The most telling argument against the contention that the area is an economic detriment to the community is that the Authority never considered any evidence on that factor before reaching its decision on the presence or absence of

blight in the area. Transcript 446-497. It would be improper, indeed impossible, to allow the Authority to attempt to justify its findings on the basis of evidence which it did not consider itself before reaching its decision.

In summary the Petitioners contend that the decision of the Authority was not supported by adequate evidence under the criteria laid down by the courts of this State and that said decision is therefore arbitrary and unreasonable and constitutes a taking of property without due process of law. Even if the evidence which the Authority considered is viewed most favorably less than half of the area can be considered blighted. There was no evidence before the Authority as to the economic or moral detriment or danger to the health or safety of the Community. The Authority apparently never considered these questions, which the courts have clearly stated are matters to be considered before the Authority can make a proper finding. Petitioners contend that this is clearly a finding which is unsupported by the evidence which it requires. In the words of the Court in *I.C.C.* v. *Louisville and N. R. R.*, 227 U. S. 88, it is "arbitrary and baseless."

QUESTION 2

Petitioners further contend that the procedure set up by the Authority and by which it reaches its decision is itself arbitrary and constitutes a failure of due process. As was pointed out in a dissenting opinion in *Snyder* v. *Massachusetts*, 291 U. S. 123 the guarantee of the Eleventh Amendment is not just that a just result will be obtained but that the result shall be reached in a fair way. This Court has stated before that parties affected by a determination of an administrative body have the right to insist on compliance with the requirements of due process. *Shield* v. *Utah*, L. & C. R. R., 305 U. S. 177. Facts and circum-

stances which the administrative agency ought to consider in reaching its decision must not be excluded. *Morgan* v. *U. S.*, op. cit. *Baltimore & O. R. R.* v. *U. S.*, 264 U. S. 258, *United States* v. *Abilene* and S. R. R., 265 U. S. 274, *Florida* v. *U. S.*, 282 U. S. 194. Persistent disregarded of known conditions which are essential to an adequate assessment of the situation by the administrative agency is arbitrary *Great Northern R. R.* v. *Weeks*, 297 U. S. 135.

The record shows that the Authority ordered the study and inspection in late 1964. Transcript 240. In February of 1965 the inspection and study was made and the consulting firm made a report available to the Authority that same month. Transcript 243. The Authority did not make a determination on the study until September of 1966, Transcript 247, and it was not presented to the City Council until 1967. Transcript 253.

During this period extensive changes had been made within the area. One of the buildings was torn down and the lot paved. Another lot was repaved, Transcript 337. Other buildings were changed and partially dismantled, Transcript 335. There were changes in the character of the businesses in the area with some moving out, others moving in. Transcript 333. Throughout the area these changes were being made yet, for purposes of the study, the area remained unchanged. None of these changes were reported to the Authority and no followup studys were ordered to ascertain whether the area's condition was in any way changed. This was done in spite of the fact that there was a lapse of a year and a half between the time that the Authority received the evidence and the time that they reached a decision on that evidence.

There was no attempt to ascertain whether the essential factors of detriment to the health, safety, welfare, and morals of the community were present nor was there any attempt by the Authority to cross check any of the

information which it had at hand, which clearly should have been done, as an examination of the record will show. In testimony concerning one of the parcels Respondents witness listed several major objections. His first was that the ceiling of the building was cracked and warping. Transcript 335. In direct testimony the owner stated the ceiling plaster had peeled and cracked, and that he had repaired to the satisfaction of the State Inspector. Transcript 142. Respondents witness stated that the light fixtures were drop cords. Transcript 335. The owner stated that he had neon light fixtures in the ceiling with one drop cord to the scales, Transcript 145, and on cross examination the Respondent's witness reversed himself and agreed with the owners testimony. Transcript 352-53. The Respondent's witness also stated that there were masonry cracks in the building's walls and that the wall was out of plumb. Transcript 335. Testimony by another engineer however was to the effect that there were no structural cracks in the wall, that it was probably laid out of plumb and that as it was not a bearing wall, it created no problem. Transcript 627. It is important to note that none of the above information, except the evidence of Respondent's witness was before the Authority when it made its decision.

There is no evidence that the Authority made any attempt to check the report of the consulting firm from discrepancies, and many appeared at trial after the decision of the Authority. The Authority called no other witnesses, nor did it attempt to gather any other information except what was put before it by the consulting firm which it had hired. Petitioners contend that this is clearly a case where information which should have been considered was not and where an administrative body has ignored facts which it should have considered before making a factual assessment of the presence or absence of blight.

The rule as stated in Denton also lays down the requirement that the condition of the area must in fact represent a

threat to the health, safety, morals, and welfare of the community. Petitioners have shown by testimony of their own witnesses and cross examination of the defendant's witnesses that the Authority failed to make such a determination. In fact, there is nothing to indicate that the Authority even considered any evidence on the question. Certainly the report which the consulting firm placed before the Authority does not deal with it. The only evidence at trial was evidence which the Authority apparently did not have before it when it made its decision. The Health Inspector stated that he had only minor complaints in the area, Transcript 447-450, and the Building Inspector testified that he had none at all. Transcript 434. As already stated the City Assessor testified that the Authority had not made any inquiry as to possible downgrading of the area economically. The evidence thus shows that the Authority failed in its duty to observe due process by failing to consider all the evidence that it was supposed to consider before it made a finding of fact.

The Authority has failed in its duty as a fact finder in several respects. It made its decision of the basis of out of date information in the face of several basic charges in the area. It made no attempt to update the evidence which it had received before it made its decision. The Authority made no attempt to obtain evidence from any other quarter besides a consulting firm which it had hired, nor did it attempt to cross check that information. Further, the Authority made no attempt to gather any information on the essentials factors of detriment to the community. All of these facts indicate that the decision of the Authority was an arbitrary one made on the basis of out of date, insufficient evidence and clearly represents a taking without due process.

CONCLUSION

This Court has held in opinion after opinion that administrative bodies are required to act in accordance with due process before they may take property from an individual. The demand of due process as pointed out in *Nebbia* v. *New York*, 291 U. S. 502 is that the laws should not be unreasonable, arbitrary or capricious. To that we may add that the same requirement extends to the administration of the law. Petitioners contend that the Authority failed to observe due process in two respects. First, that the decision which the Authority made was clearly unsupportable by the evidence which it had before it in light of the requirements set by the Courts of this State. Second, that the manner by which the Authority reached its decision prevented the inclusion of certain essential evidence which the Authority had to have in order to reach a decision under the law. The decision which the Authority reached is arbitrary and capricious and constitutes a taking of property without due process. That decision should be declared without effect.

SUPREME COURT, U. S.

AUG 25 1969

JOHN F. DAVIS, CLERK

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Petitioners

v.

CITY OF CHARLOTTESVILLE, VIRGINIA, and CHARLOTTESVILLE REDEVELOPMENT and HOUSING AUTHORITY
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE CORPORATION COURT OF THE CITY OF CHARLOTTESVILLE, VIRGINIA

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

Though the Corporation Court of the City of Charlottesville, Virginia, did not render a formal written opinion, the reasons for its decision were set forth in a lengthy

order. This order, which is attached hereto as "Appendix A", is very similar to a memorandum opinion except for its style and can be treated as such.

The order of the Supreme Court of Appeals of Virginia, dated April 29, 1969, and attached to this brief as "Appendix B", had the effect of affirming the Corporation Court's judgment.

JURISDICTION

Contrary to contentions made by petitioners, respondents submit that jurisdiction does not exist in the instant case, under 28 U.S.C. §1257 or any other provision of law.

Petitioners have failed to raise a federal question in the state courts and they cannot claim successfully that any such question was preserved or decided below. Moreover, the decision to which they are objecting is based on independent and adequate state grounds. And finally, the due process argument now made by petitioners falls far short of presenting a substantial federal question.

In essence, petitioners are asking this Court to sit as a fact finding body to review the physical and geographic conditions related to an urban renewal project located in Charlottesville, Virginia. The Supreme Court of the United States, respondents respectfully submit, lacks jurisdiction to perform such a function in the present case.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The only federal constitutional provision involved is the "due process" portion of the Fourteenth Amendment set forth by the Petitioners.

Also involved is a portion of the Virginia Code, § 36-49, which portion is as follows:

"§ 36-49. UNDERTAKINGS CONSTITUTING REDEVELOPMENT PROJECTS. — Any authority now or hereafter established, in addition to other powers granted by this or any law, is specifically empowered to carry out any work or undertaking (hereafter called a 'redevelopment project'):

(1) To acquire blighted or deteriorated areas, which are hereby defined as areas (including slum areas) with buildings or improvements which, by reason of dilapidation, obsolescence, overcrowding, faulty arrangement of design, lack of ventilation, light and sanitary facilities, excessive land coverage, deleterious land use or obsolete layout, or any combination of these or other factors, are detrimental to the safety, health, morals or welfare of the community;

(2) To acquire other real property for the purpose of removing, preventing, or reducing blight, blighting factors or the cause of blight;

(3) To acquire real property where the condition of the title, the diverse ownership of the real property to be assembled, the street or lot layouts, or other conditions prevent a proper development of the property and where the acquisition of the area by the authority is necessary to carry out a development plan; ....."

QUESTIONS PRESENTED

1. Was any Fourteenth Amendment "due process" issue duly raised or decided in the courts below?
2. Does the judgment below rest on independent and adequate state grounds and thereby preclude adjudication by this Court of the federal question now presented for review?
3. When petitioners seek judicial review of a legislative

finding that their land is blighted and that the land is necessary for an existing urban renewal project, are they presenting a federal question of any substance?

STATEMENT OF THE CASE

In 1958, the Charlottesville Redevelopment and Housing Authority initiated the Vinegar Hill Urban Renewal project on a 20 acre site on the north side of West Main Street in Charlottesville, Virginia. In 1964, the Authority began considering amending the plan by revising the boundaries of the project to include .7 acres on the south side of West Main Street which appeared blighted and necessary to the success of the project. A consulting firm was employed December 1, 1964, to study the area and prepare the amendment to the urban renewal plan.

In February, 1965, the firm submitted to the Authority its report (Defendants' Exhibit No. 5 in the trial court). In the report, it was concluded that the .7 acres contained eight parcels of land, seven of which were blighted and that the inclusion of the .7 acres was necessary to achieve the objectives of the project. The building on one of the parcels of land was removed subsequent to the report. Of the seven remaining buildings, six were considered blighted. Side yards, rear yards, and parking areas constituted more than half of the .7 acres but did not prevent the individual parcels from being blighted. The Authority, on September 8, 1966, by resolution, determined that the .7 acres, as a whole, was blighted and amended the plan to include the .7 acres.

After a public hearing on June 5, 1967, held to consider the amendment, at which petitioners were present, City Council, by resolution, concurred in the finding of blight and approved the amendment.

This suit was commenced by petitioners in the Corpo-

ration Court of the City of Charlottesville, Virginia, seeking an injunction to prevent the acquisition of .7 acres by the Authority by the exercise of the power of eminent domain. The Corporation Court denied the injunction. Petitioners then sought a writ of error from the Supreme Court of Appeals of Virginia which was refused.

ARGUMENT

1. NOT ONCE IN EITHER THE STATE TRIAL COURT OR BEFORE THE SUPREME COURT OF APPEALS OF VIRGINIA DID PETITIONERS ADEQUATELY PRESENT A FEDERAL DUE PROCESS ARGUMENT. HAVING FAILED TO DO SO, THEY HAVE WAIVED THEIR RIGHTS TO MAKE SUCH A CONTENTION BEFORE THIS COURT.

Petitioners attempt to demonstrate how they raised a due process argument in the courts below. They cite paragraph 7 of their Amended Bill of Complaint, which paragraph reads:

> "7. That the proposed Redevelopment project does not constitute a valid undertaking within the meaning of Sections 36-1 through 36-55, Code of Virginia (1950), as amended, and that a judicial determination of the facts will demonstrate that conditions in the said area as a whole are not detrimental to the safety, health, morals or general welfare of the community;"

No matter how many times one might examine the foregoing language, he will not succeed in discovering a federal question. Not even a slight hint is found within paragraph 7 that petitioners are claiming a violation of

the due process clause. This paragraph is nothing more than an obvious attempt to allege that the land of petitioners is not, under state law, subject to taking for an urban renewal project.

Petitioners also point to pages 261, 263, 265-66 and 520 of the transcript in an effort to show the manner in which they raised a federal question at trial. But these pages do not give evidence of any properly raised federal question. Instead, they only serve to confirm that the Virginia trial court was never asked to give serious consideration to a Fourteenth Amendment due process argument.

Though not mentioned in the petition for a writ of certiorari, the pleadings filed by petitioners in the trial court make various allegations that action by the Authority was "arbitrary and unreasonable". This language, however, should not be construed as some vague presentation of a due process argument. Such references have evolved in Virginia in similar cases because of the limited scope of judicial review. As the Court indicated in *Runnels* v. *Housing Authority*, 207 *Va.* 407, 410, 149 *S.E.2d* 882, 885 (1966) when certain landowners also sought to prevent acquisition of properties with an urban renewal project ". . . legislative findings will not be disturbed unless they are arbitrary and unreasonable." This principle of state law exists because the legislative findings of the Authority and the City Council are clothed with a presumption of validity. The words "arbitrary and unreasonable", therefore, have no relation to any alleged federal due process question.

Because no federal question was raised in the trial court, respondents submit that such a question cannot be presented at this stage. Rule of Court 1:8 of the Supreme Court of Appeals of Virginia requires that all ob-

jections or motions which need a ruling or judgment of the trial court be stated with reasonable certainty. Unless an objection is so stated, such objection will not be considered by the Supreme Court of Appeals. See, e.g., *Harlow* v. *Commonwealth*, 195 *Va.* 269, 77 *S.E.2d* 851 (1953). In light of the foregoing Virginia rule, petitioners' failure to raise their federal question in the trial court becomes fatal to the jurisdiction of this Court. *Edelman* v. *California*, 344 *U.S.* 357 (1953); *Mutual Life Ins. Co.* v. *McGrew*, 188 *U.S.* 291 (1903). See also, *Bailey* v. *Anderson*, 326 *U.S.* 203 (1945) where this proposition was used to defeat jurisdiction in a case arising in Virginia.

As if failing to raise a federal question in the trial court were not alone sufficient to defeat jurisdiction here, in this Court, petitioners compounded their earlier mistake when attempting to appeal to Virginia's highest court. The "Notice of Appeal and Assignments of Error" filed by petitioners and attached hereto as "Appendix C" contains not one word, either express or implied, about the United States Constitution or violation of rights under the due process clause. Thus, even if petitioners had properly raised the question with some precision before the trial judge, under the Rules of the Supreme Court of Appeals of Virginia (Rule 5:1 §4, Volume 2, Code of Virginia, 1950), that highest state court could not and did not consider such question because the question was not assigned as an error. *Farrow* v. *Commonwealth*, 197 *Va.* 353, 89 *S.E.2d* 312 (1955); *Harlow* v. *Commonwealth*, 195 *Va.* 269, 77 *S.E.2d* 851 (1953). This, of course, also precludes review before the United States Supreme Court. *Beck* v. *Washington*, 369 *U.S.* 541, 549-553 (1962); *Capital City Dairy Co.* v. *Ohio*, 183 *U.S.* 238 (1902).

2. EVEN IF PETITIONERS WERE ABLE TO SHOW THAT THE CONDITION OF THEIR PROPERTIES IS SUCH THAT IT IS NOT "BLIGHTED" UNDER VIRGINIA LAW AND THAT, SOMEHOW, A LEGISLATIVE FINDING TO THE CONTRARY ESTABLISHES A FEDERAL QUESTION, THEY ARE NOT ENTITLED TO REVIEW IN THIS COURT BECAUSE THE DECISION BELOW ALSO RESTS ON INDEPENDENT AND ADEQUATE STATE GROUNDS WHICH SUPPORT DENIAL OF THE INJUNCTIVE RELIEF SOUGHT.

For many years, it has been well established that, if a state court decision is based on a nonfederal ground which is adequate to support the result reached, such an independent state ground will suffice to defeat jurisdiction of this Court. *Herb* v. *Pitcairn*, 324 *U.S.* 117 (1945); *Fox Film Corp.* v. *Muller*, 296 *U.S.* 207 (1935); *Murdock* v. *City of Memphis*, 87 *U.S.* (20 Wall) 590 (1875). This important limitation on Supreme Court review was discussed at some length by Justice Jackson in *Herb* v. *Pitcairn*, supra, at pages 126-27 where he said:

> "This Court has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. . . . The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. *And our power is to correct wrong judgments, not to revise opinions. We are not*

permitted to render advisory opinions, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review would amount to nothing more than an advisory opinion.

(emphasis supplied)

Respondents contend that regardless of the outcome of any federal due process claim now made by petitioners, the result of the judgment below will remain unchanged. Section 36-49(2) of the Code of Virginia, 1950, gives local housing authorities power to acquire real property even when it is not blighted if the acquisition is to prevent blight or blighting factors or the cause of blight. Subparagraph 3 of the same state statute, §36-49, goes even further. It gives a housing authority power to acquire property:

". . . where the condition of the title, the diverse ownership of the real property to be assembled, the street or lot layouts, or other conditions prevent a proper development of the property and *where the acquisition of the area by the authority is necessary to carry out a redevelopment plan;*" (emphasis supplied)

Examination of the record in this case demonstrates readily enough that petitioners' land, a part of the .7 acres in question, was added to the twenty (20) acre Vinegar Hill project on the opposite side of West Main Street because the Charlottesville Redevelopment and Housing Authority exercised authority granted to it under this last quoted statutory language, because the .7 acre tract was deemed necessary to carry out the redevelopment plan. The Application for Loan and Grant, which application included the project area report (Defendants'

Exhibit No. 5 in the trial court) states at page 11 of said report under Summary of Condition 2B:

> "This property is so located within the project that its acquisition and clearance is mandatory if the objectives of the Redevelopment Plan for this area are to be realized."

According to the evidence before the Housing Authority, the urban renewal plan should have been amended so as to include petitioners' property in order to:

1. Remove a pocket of blight directly adjacent to the primary disposition parcel.
2. To enhance and upgrade one of the main approaches to the Central Business District from the west.
3. To provide for possible expansion of existing retail outlets as well as off-street parking to serve such outlets.

(Page 1 of the Project Area Report, Defendants' Exhibit No. 5 in the trial court).

The last two reasons set forth above leave no real doubt that the Authority grounded its legislative decision on more than a finding of blight. The trial judge recognized this in his final order (Appendix A, page A-4 subparagraph (c)) and, accordingly, made the Authority's determination that petitioners' land was needed for the urban renewal project one of three alternative grounds for his decision. Such an alternative ground, arising as it does from a state statute, is certainly nonfederal in nature and, therefore, will defeat jurisdiction in this Court regardless of the merits of any separate federal claim related to blight. See, e.g., *Fox Film Corp.* v. *Muller*, 296 *U.S.* 207, 219 (1935) where a writ was dismissed for want of jurisdiction even though it was assumed the federal question was one of merit.

There is still another independent and adequate state

ground which should defeat federal review here. By omitting any alleged violation of rights under the federal constitution in their assignments of error, petitioners have not complied with state procedural rules, particularly Rule 5:1 §4, Rules of Court of the Supreme Court of Appeals of Virginia. Noncompliance with such local laws can thus be an adequate state ground for the decision below. See, e.g., *Edelman* v. *California*, 344 *U.S.* 357, 358 (1953). As previously stated, the Rules of the Supreme Court of Appeals of Virginia require that all alleged errors, including those related to the Fourteenth Amendment due process clause, be specifically assigned as errors and filed with the highest state court. Failure to assign any such errors before the Supreme Court of Appeals of Virginia will result in the failure of that court to consider those errors not mentioned in the assignment. *Farrow* v. *Commonwealth, supra; Harlow* v. *Commonwealth, supra.* And a state procedural ground of this nature can be equal in importance to a state substantive ground in precluding review of federal questions by this Court. *Beck* v. *Washington*, 369 *U.S.* 541, 549-553 (1962).

3. BECAUSE THE DUE PROCESS ARGUMENT NOW MADE BY PETITIONERS IS ONE WHICH IS NOTHING MORE THAN A FORMAL DECLARATION AND IS WHOLLY WITHOUT FOUNDATION, IT SHOULD NOT BE HEARD BY THIS COURT. ON THE CONTRARY, THE PETITION SHOULD BE DISMISSED FOR WANT OF A SUBSTANTIAL FEDERAL QUESTION.

Petitioners come before this Court making two arguments, both of which, when summarized, amount to an assertion that the evidence before the Charlottesville Redevelopment and Housing Authority was insufficient to

support a finding that the .7 acres, as a whole, was blighted. Such a charge is without basis in fact. The overwhelming weight of evidence indicates that the opposite is true. (Tr. 257-280, 310-342). Furthermore, in an urban renewal case where the public purpose is established beyond gainsay, it is not for individuals, like petitioners, and it is not for the courts, to weigh their conception of the facts against the judgment of housing authorities and other legislative bodies. Absent a showing of bad faith or fraud, once the findings of blight or necessity have been made, once the public interest has been declared, such declaration is in terms "well-nigh conclusive." *Berman* v. *Parker*, 348 *U.S.* 26, 32 (1954).

Decisions of the Supreme Court leave no room for real controversy on this question and arguments like those made by petitioners have been consistently rejected. See, e.g., *Burt* v. *City of Pittsburgh*, 340 *U.S.* 802 (1950); *Grisanti* v. *City of Cleveland*, 371 *U.S.* 68 (1962); *Starr* v. *Nashville Housing Authority*, 354 U.S. 916 (1957). For lower court decisions with pertinent factual analogies, see *Grisanti* v. *City of Cleveland*, 181 *N.E.2d* 299 (1962); *Eikenbary* v. *City of Dayton*, 210 *N.E.2d* 402 (1964) (urban renewal project where boundary amended to include additional 12.5 acres).

Since the facts and the last cited decisions of this Court effectively foreclose the due process arguments now made by petitioners, there is no federal question to support jurisdiction. The petition should be dismissed.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,
GEORGE GILMER,
Attorney for Respondents,
The City of Charlottesville and the Charlottesville Redevelopment and Housing Authority

W. CLYDE GOULDMAN
DAVID J. WOOD, JR.
230 Court Square
Charlottesville, Virginia
Of Counsel.

"APPENDIX A"

VIRGINIA: AT A CORPORATION COURT OF THE CITY OF CHARLOTTESVILLE, ON THE CHANCERY SIDE THEREOF, HELD ON FRIDAY, SEPTEMBER 13th, 1968.

Present: Honorable GEORGE M. COLES, *Judge*

WALTER FOWLER, ET AL.
V.
CITY OF CHARLOTTESVILLE, ET AL.
} ORDER

This cause came on this day to be heard on March 26 through March 30, 1968, and on the papers formerly filed in this proceeding.

Whereupon, the complainants produced evidence ore tenus, at the conclusion of which the respondents moved to strike the evidence of the complainants as insufficient to support the relief prayed for in the bill. The Court, after hearing arguments upon the motion, overruled the same, to which action the respondents, by counsel, excepted.

Whereupon, the respondents produced evidence ore tenus.

Whereupon, counsel for complainants and counsel for respondents argued the points at issue.

Whereupon, the Court noted that the bill of complaint referred only to the 7/10ths of an acre on the south side of Main Street, and, in overruling point (2) of the demurrer, it had indicated that the presence of blight in the 7/10ths of an acre was the issue in this case. The Court, after hearing the evidence and arguments, was of the opinion that the condition of the 20 acres, more or less, on the north side of Main Street constituting the remainder of the project area, was also material to this case. Consequently, the Court indicated that the complainants

should be given an opportunity to produce evidence with respect to the 20 acres.

Whereupon, on May 29, 1968, counsel for complainants indicated that the only evidence they wished to produce with respect to the 20 acres could be presented by stipulation. Counsel for complainants presented a stipulation which reads as follows:

> "In April, 1965 demolition of the improvements located on the North side of Main Street on the said Twenty (20) acre tract within the Vinegar Hill Project had been completed. The entire area was on that date vacant and has been vacant ever since, and the land did not contain any buildings anytime after April, 1965."

Counsel for the respondents agreed to the stipulation.

The complainants brought to the Trial Court's attention the argument that Section 14a of the Charter of the City of Charlottesville requires a referendum on this project, since the Court has now included in its deliberation a consideration of the condition of the original project area of the 20 acre tract.

The complainants thereupon moved the Court that judgment be rendered in their favor on the ground that no referendum had been conducted with respect to the entire project area composed of the 20 acre tract plus the 7/10ths of an acre and that such referendum is required by Section 14a of the Charter of the City of Charlottesville.

Whereupon, it appearing to the Court as follows:

1. The primary responsibility for determining blight is on Charlottesville Redevelopment and Housing Authority;

2. The Charlottesville Redevelopment and Housing Authority has made a finding that the entire project area,

including the 7/10ths of an acre, was blighted, and the action of Charlottesville Redevelopment and Housing Authority is clothed with a presumption of validity. For the complainants to prevail in this cause, they must show by clear and convincing evidence that the action of Charlottesville Redevelopment and Housing Authority was arbitrary and unreasonable;

3. There are at least three findings, any one of which if reasonable under the circumstances, could have served as justification for the Authority to include the 7/10ths of an acre on the south side of Main Street within the Vinegar Hill project area. The Authority, by resolution dated September 8, 1966, approving the Application for Loan and Grant dated September 8, 1966, which application contained the project area report (respondent's "Exhibit 5"), made all three findings, namely: (1) that the 7/10ths of an acre, standing alone, was blighted and deteriorated; (2) that the entire 21.4 acre project, including the 7/10ths of an acre on the south side of Main Street, was 78.1% blighted and deteriorated; and (3) that, in effect, the 7/10ths of an acre was necessary to carry out the redevelopment project.

a. Complainants have failed to show that the Authority's finding that the 7/10ths of an acre was blighted was arbitrary and unreasonable. In September of 1966, the Authority made its decision based on reports prepared in February, 1965. Although there were some changes in the physical condition of the 7/10ths of an acre, there was no undue delay between the preparation of these reports and the Authority's decision. The Court is of the opinion that the complainants have failed to carry the burden of showing that the 7/10ths of an acre was not, in fact, blighted on September 8, 1966;

b. The Authority, by its resolution dated September 8, 1966, determined that the entire 21.4 acre project area,

including the 7/10ths of an acre, was 78.1% blighted, which finding was based on reports dated 1960 and February, 1965. The complainants have failed to carry their burden of showing that this finding of the Authority was arbitrary and unreasonable; and

c. It was decided by the Authority to include the 7/10ths of an acre in its project boundary because the Authority decided that this 7/10ths of an acre was necessary to carry out the purpose of the project, namely: to "remove, prevent or reduce blight". The complainants have failed to carry the burden of showing that this action of the Authority was in bad faith, arbitrary, and unreasonable.

4. Section 14a of the Charter of the City of Charlottesville specifically applied to public housing projects and, since this is an urban renewal project, it has no application here.

THEREFORE, it is ADJUDGED, ORDERED and DECREED that the relief sought by the complainants be and the same is hereby denied. To which action, the complainants except.

Whereupon, it appearing to the Court that the complainants have indicated an intention to petition the Supreme Court of Appeals of Virginia for a writ of error and supersedeas to this decree. On motion of said complainants, by counsel, it is ORDERED that the respondents be enjoined from proceeding to acquire the property of the complainants until such time as the Supreme Court acts on the petition for a writ of error, but, before said injunction shall be effective, complainants are hereby required to execute, within thirty (30) days from the date of this order, a suspension bond with approved security before the Clerk of this Court in the penalty of $2,500.00 to secure to the respondents all of the damages to the respondents resulting from the delay caused by the injunc-

tion, and an appeal bond in the penalty of $1,000.00 with security approved by the Clerk of this Court conditioned and payable as the law directs and to the provisions of Title 8, Section 477 of the Code of Virginia, as amended.

* * * *

S/GEORGE M. COLES, *Judge*

A Copy, Teste:—
CARL E. HENNRICH, *Clerk*

"APPENDIX B"

VIRGINIA: IN THE SUPREME COURT OF APPEALS HELD AT THE SUPREME COURT OF APPEALS BUILDING IN THE CITY OF RICHMOND ON *Tuesday* THE *29*TH DAY OF *April, 1969.*

The petition of Walter Fowler, Braxton Fowler and Margaret F. Clark for an appeal from a decree entered by the Corporation Court of the City of Charlottesville on the 13th day of September, 1968, in a certain chancery cause then therein depending, wherein the said petitioners were plaintiffs and the City of Charlottesville and another were defendants, having been maturely considered and a transcript of the record of the decree aforesaid seen and inspected, the court being of opinion that there is no reversible error in the decree appealed from, doth reject said petition, and refuse said appeal, the effect of which is to affirm the decree of the said corporation court.

A Copy,
Teste:—
HOWARD G. TURNER,
Clerk
By ALLEN L. LUCY
Deputy Clerk

"APPENDIX C"

VIRGINIA: IN THE CORPORATION COURT OF THE CITY OF CHARLOTTESVILLE

WALTER FOWLER
MARGARET F. CLARK
BRAXTON FOWLER
Complainants

V

CITY OF CHARLOTTESVILLE
c/o Burkett A. Rennolds,
Mayor
City Hall
Charlottesville, Virginia

and

THE CHARLOTTESVILLE
REDEVELOPMENT AND
HOUSING AUTHORITY
c/o A. E. Arrington
Executive Director
Charlottesville Redevelopment and Housing Authority
Charlottesville, Virginia
Defendants

NOTICE OF APPEAL AND ASSIGNMENT OF ERROR

The complainants, Walter Fowler, Margaret F. Clark, Braxton Fowler and Walter Verling, do hereby give Notice of Appeal from the final judgment decree entered in this suit on the *13* day of *September,* 1968 pursuant to Section 4, Rule 5:1 of the Rules of the Supreme Court of Appeals of Virginia.

The following are errors assigned:

(1) That the Court erred in failing to make a finding

that the Vinegar Hill Project Area was not blighted or deteriorated within the meaning of Virginia Code Section 36-49.

(2) That the Court erred in failing to hold that the conditions which existed in the Project Area were not detrimental to the safety, health, morals or welfare of the Community.

(3) That the Court erred in finding that the actions of the Charlottesville Redevelopment Authority and the City of Charlottesville were not arbitrarily and unreasonable as to the proposed taking of the seven-tenths (7/10) of an acre on Main Street.

(4) That the Court erred in finding that the survey on which the Authority based its findings were not too remote from the time the Redevelopment Authority and the City Council acted.

(5) That the Court erred in finding that Section 14a of the City Code of Charlottesville did not apply to the redevelopment area.

(6) That the Court erred in denying the complainants the right to produce evidence as to the original twenty (20) acre tract of the redevelopment area during the Trial and further erred in ruling two weeks after all evidence were in and all parties had rested that the said twenty (20) acre tract should be considered in the evidence.

(7) That the Court erred in finding that the Charlottesville City Council had not exceeded its authority in determining that the said area was a slum, blighted or deteriorated.

Respectfully Submitted,
WALTER FOWLER
MARGARET F. CLARK
BRAXTON FOWLER
By Counsel

Erwin S. Solomon
Counsel
Hot Springs, Virginia 24445

I hereby certify that a copy of the foregoing Notice of Appeal and Assignment of Error was mailed this 18th day of October, 1968 to David J. Wood, Jr., 230 Court Square, Charlottesville, Virginia and W. Clyde Gouldman, City Attorney, Charlottesville, Virginia, attorneys for the defendants.

Erwin S. Solomon